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No. 95-965

In the Supreme Court of the United States

OCTOBER TERM, 1995

STANLEY R. STERN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether proof of willful blindness is sufficient to establish the element of knowledge in a money laundering prosecution under 18 U.S.C. 1956(a)(1)(B)(i).

2. Whether, in a prosecution under 18 U.S.C. 371 for conspiracy to defraud the United States by impeding and impairing the Internal Revenue Service in the collection of information regarding currency transactions reports, the government must prove that the defendant had the mens rea necessary to establish an independent criminal violation of the currency transaction reporting requirements.

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OPINION BELOW

The decision of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1995. The petition for a writ of certiorari was filed on December 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiracy to defraud

the United States and to commit money laundering, in violation of 18 U.S.C. 371, and one count of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). He was sentenced to 60 months' imprisonment, to be followed by three years' supervised release, and was ordered to pay restitution of $662,000. Pet. 3-5. The court of appeals affirmed.

1. Petitioner, a licensed attorney, participated in a scheme to defraud Harold Heye, a Florida businessman, out of large amounts of money, and at the same time to defraud the United States. Between April and October 1987, petitioner's co-conspirators swindled $900,000 from Heye, having falsely represented to him that they would invest his funds in various overseas ventures. In May 1988, they convinced Heye to "invest" a further $350,000. The conspirators needed a means to distribute Heye's money amongst themselves without having the transactions reported to the government as required by law.[1] Accordingly, one of the conspirators (Anthony DiStefano, whom petitioner had represented in a bankruptcy proceeding) asked petitioner whether he would cash checks for a third party. Petitioner said that he would, for a fee. Petitioner then gave DiStefano the number of a New York bank account that petitioner's law firm used for funds held in escrow. Gov't C.A. Br. 4-6.

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[1] Whenever a financial institution receives or distributes in excess of $10,000 in cash in a single transaction, the institution must file a Currency Transaction Report (CTR) with the Internal Revenue Service (IRS). 31 U.S.C. 5313(a); 31 C.F.R. 103.22. Willful violation of that requirement is a crime punishable by a fine of not more than $250,000 or imprisonment for not more than five years, or both. 31 U.S.C. 5322(a).

On May 6, 1988, the conspirators instructed Heye to wire-transfer $100,000 to petitioner's escrow account. Petitioner transferred $99,000 of that $100,000 to a bank account in the name of Melvyn M. Molava, in Orlando, Florida, and kept the remaining $1,000 as a 1% commission for his services. Petitioner's records reflect that the transaction was conducted on behalf of his bankrupt client, DiStefano. Gov't C.A. Br. 6-7.

Molava, an acquaintance of the conspirators and a citizen of England, had opened the Orlando bank account only days before. He withdrew $95,000 of the $99,000 from the account, which the conspirators split amongst themselves. By using Molava, the conspirators assured that all paperwork, including CTRs, would be completed in Molava's name. Gov't C.A. Br. 7.

On May 10, 1988, Heye wire-transferred the remaining $250,000 to petitioner's escrow account. Petitioner then wrote a check to himself for $250,000 and deposited the check into his personal bank account. Five days later, he transferred the $250,000 from his personal account to a different escrow account in his firm's name, and from there transferred $247,500 to Molava's bank account, retaining $2500 as his 1% commission. Gov't C.A. Br. 8.

When Molava's bank refused to permit him to withdraw the newly transferred funds, the $247,500 was transferred back to petitioner's escrow account. Petitioner credited the returned funds to DiStefano's bankruptcy matter. He then agreed, for a more generous fee, to liquidate the account and distribute the funds to the conspirators in cash. Gov't C.A. Br. 8.

To obtain the necessary currency, petitioner enlisted the aid of New York businessman Abraham Markowitz. In exchange for $250,000 in cash, petitioner wrote checks totalling $257,500 on his trust account to Markowitz and to various entities associated with Markowitz. After deducting his commission and $7500 to cover the payment to Markowitz, petitioner dispensed the cash to the conspirators. Gov't C.A. Br. 8-9.

On October 19, 1988, the conspirators convinced Heye to wire-transfer an additional $312,000 to petitioner's escrow account, again purportedly as an overseas investment. Petitioner then wrote checks on the escrow account totalling $210,080 to Markowitz and several entities designated by Markowitz, and disbursed the currency he received in return to the conspirators. Gov't C.A. Br. 9-10.

Petitioner did not file a CTR with respect to any of the transactions, and he never inquired about the source of the money. Petitioner confided to an FBI agent, however, that he thought he had been dealing with drug money. Gov't C.A. Br. 10.

2. Petitioner argued on appeal that the district court should have instructed the jury that he could not be convicted on the conspiracy charge unless the jury found that he knew that he was acting as a financial institution within the meaning of 31 U.S.C. 5313(a) and that he willfully violated currency transaction reporting requirements. Gov't C.A. Br. 15. Petitioner had not requested any such instruction from the district court. *Id.* at 10.

Petitioner also argued on appeal that the district court erred in instructing the jury on the substantive money laundering count. The court had informed the jury that, to convict, it must conclude that petitioner

"acted with knowledge that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity." R7-158. Petitioner objected to the court's further instruction that the jury could find the requisite knowledge if it concluded that petitioner was aware of a high probability that the funds were proceeds of unlawful activity and willfully blinded himself to the nature of their origin. Gov't C.A. Br. 22.[2] The court of appeals affirmed petitioner's convictions on both counts without comment. Pet. App. 1a-2a.

ARGUMENT

1. Petitioner argues (Pet. 6-9) that, in affirming the district court's use of a "willful blindness" instruction in his money laundering prosecution, the court of appeals erroneously failed to require a finding of knowledge. Section 1956(a)(1)(B)(i) of Title 18 does require proof of knowledge, rather than mere recklessness or negligence. See *United States* v. *Lora*, 895 F.2d 878, 880 n.2 (2d Cir. 1990). "It is well settled," however, "that willful blindness or conscious avoidance is the legal equivalent to knowledge," *United States* v. *Antzoulatos*, 962 F.2d 720, 724 (7th Cir.), cert. denied, 506 U.S. 919 (1992).

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[2] Petitioner also argued on appeal that the district court (i) abused its discretion by admitting testimony regarding New York State Bar requirements concerning the maintenance of escrow accounts (see Pet. C.A. Br. 37-39) and (ii) erred in determining, for sentencing purposes, that petitioner used a special skill in the commission of the offense and obstructed justice (see *id.* at 39-41). The court of appeals rejected those arguments and petitioner does not challenge that aspect of the court's decision.

The purpose of a willful blindness charge "is to alert the jury that the avoidance of knowledge of particular facts may circumstantially show that the avoidance was motivated by sufficient guilty knowledge to satisfy the specific criminal statute." *United States* v. *Ochoa-Fabian*, 935 F.2d 1139, 1141 (10th Cir. 1991), cert. denied, 503 U.S. 961 (1992). See *United States* v. *Schnabel*, 939 F.2d 197, 203 (4th Cir. 1991) ("The willful blindness instruction allows the jury to impute the element of knowledge to the defendant."); *United States* v. *Ramsey*, 785 F.2d 184, 190 (7th Cir.) ("[A] person who has enough knowledge to prompt an investigation and then avoids further knowledge really does 'know' all that the law requires."), cert. denied, 476 U.S. 1186 (1986).

The law makes no distinction between deliberate ignorance and actual knowledge. Thus, the regional courts of appeals have uniformly held that a willful blindness instruction may be given where actual knowledge is an element of an offense, so long as the record supports an inference that the defendant was subjectively aware of a high probability of the existence of the operative facts and consciously avoided obtaining further knowledge. See *United States* v. *Cincotta*, 689 F.2d 238, 243 n.2 (1st Cir.), cert. denied, 459 U.S. 991 (1982); *United States* v. *MacKenzie*, 777 F.2d 811, 818-819 (2d Cir. 1985), cert. denied, 476 U.S. 1169 (1986); *United States* v. *Caminos*, 770 F.2d 361, 366 (3d Cir. 1985); *United States* v. *Whittington*, 26 F.3d 456, 461-462 (4th Cir. 1994); *United States* v. *Fierro*, 38 F.3d 761, 772 (5th Cir. 1994), cert. denied, 115 S. Ct. 1431 (1995); *United States* v. *Warshawsky*, 20 F.3d 204, 210-211 (6th Cir. 1994); *Ramsey*, 785 F.2d at 189; *United States* v. *Jensen*, 69 F.3d 906, 912 (8th Cir. 1995); *United States* v. *Jewell*, 532 F.2d 697 (9th

Cir.) (en banc), cert. denied, 426 U.S. 951 (1976); *Ochoa-Fabian*, 935 F.2d at 1141-1142; *United States* v. *Adair*, 951 F.2d 316, 319 (11th Cir. 1992).

There is no reason to treat the "knowledge" element in Section 1956(a)(1)(B)(i) any differently. Indeed, the legislative history of Section 1956(a)(1)(B)(i) shows that Congress specifically contemplated proof of knowledge through evidence of willful blindness. The Senate Report explained that "[t]he 'knowing' scienter requirements are intended to be construed, like existing 'knowing' scienter requirements, to include instances of 'willful blindness.'" S. Rep. No. 433, 99th Cong., 2d Sess. 9-10 (1986).

Moreover, the district court's willful blindness instruction in this case expressly forbade the jury from convicting petitioner upon a lesser standard than knowledge: "I must emphasize, however, that the requisite proof of knowledge on the part of [the] Defendant cannot be established by merely demonstrating that he was negligent, careless or foolish." (R7-162-163).[3] Accordingly, there is no basis for peti-

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[3] The complete instruction reads as follows:

> [W]ith respect to the issue of the Defendant's knowledge in this case if you find from all of the evidence beyond a reasonable doubt that the Defendant believed that the money sent to his escrow accounts was the proceeds of some unlawful activity, and deliberately and consciously tried to avoid learning that fact in order to be able to say, if he should be apprehended, that he did not know that the proceeds were from some unlawful activity, you may treat such deliberate avoidance of positive knowledge as the equivalent of knowledge.
>
> In other words, you may find that a Defendant acted knowingly if you find beyond a reasonable doubt either: One, that the Defendant actually knew that the money sent

tioner's assertion that the district court failed to instruct the jury regarding the governments' burden to establish knowledge.

Finally, contrary to petitioner's assertion (Pet. 8-9), the court of appeals' approval of the district court's willful blindness instruction does not conflict with any decision of any other court of appeals. The courts of appeals in *United States* v. *Heaps*, 39 F.3d 479, 484 (4th Cir. 1994), and *United States* v. *Lora*, 895 F.2d at 880 n.2—like the district court below—correctly required proof of knowledge, rather than mere recklessness or negligence. Neither case addressed whether proof of willful blindness is sufficient to establish knowledge.

2. Petitioner also argues (Pet. 10-12) that the district court improperly instructed the jury on the required mental state for a conviction of conspiracy to defraud the United States, in violation of 18 U.S.C. 371. According to petitioner, because a conviction for violating the currency transaction reporting requirements, under 31 U.S.C. 5322(a), requires proof that the defendant knew that his conduct was illegal (see *Ratzlaf* v. *United States*, 114 S. Ct. 655 (1994)), when a conspiracy to defraud charge is based on an agreement to impede the IRS's collection of information regarding CTRs, the government must establish

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to his escrow accounts was the proceeds of some unlawful activity, or, two, that he deliberately closed his eyes to what he had every reason to believe was the fact.

I must emphasize, however, that the requisite proof of knowledge on the part of the Defendant cannot be established by merely demonstrating that he was negligent, careless or foolish.

R7-162-163.

that petitioner knew that he had an obligation to file CTRs and that he deliberately violated the law. Petitioner did not raise that argument at trial, Gov't C.A. Br. 10, and he is therefore entitled to relief only if the district court plainly erred. See Fed. R. Crim. P. 30, 52(b).

a. Petitioner was charged under 18 U.S.C. 371 (1988), which provides in relevant part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

As the text makes clear, conspiracy to defraud the United States is a separate and distinct crime from conspiracy to commit an offense against the United States. See *United States* v. *Jackson*, 33 F.3d 866, 870-871 (7th Cir. 1994), cert. denied, 115 S. Ct. 1316 (1995). Conspiracy to commit an offense against the United States requires proof of "at least the degree of criminal intent necessary for the substantive offense itself." *United States* v. *Feola*, 420 U.S. 671, 685-686 (1975). Conspiracy to defraud the United States, on the other hand, requires proof only that the defendant agreed to interfere with or obstruct a lawful function of government by deceit, craft, trickery, or dishonest means and that an overt act was committed by one of the conspirators in furtherance of the conspiracy. See *Jackson*, 33 F.3d at 872.

Petitioner was not charged with conspiracy to violate the CTR filing requirement. Rather, he was

charged with conspiracy to defraud the United States *by* "impeding and impairing the IRS in the lawful performance of its duties; to wit: the collection of information on CTRs regarding currency transactions with financial institutions and people acting as financial institutions." Indictment, Count 1.[4] As the Seventh Circuit noted in *Jackson*, 33 F.3d at 871, "*Ratzlaf*'s holding concerning the meaning of 'willfully violating' in the [currency transaction reporting] laws * * * has no bearing on" petitioner's conviction under the conspiracy-to-defraud clause of Section 371, which has no such language.

Petitioner's failure to file CTRs for the currency transactions in this case was one means of carrying out the conspiracy, but it was not the only means alleged by the government and, under settled principles of conspiracy law, the means alleged did not have to constitute crimes in and of themselves. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809 (1946). Other means of accomplishing the objectives of the conspiracy in this case included petitioner's failure to maintain required records relating to the financial transactions; the opening of a bank account in the name of Melvyn M. Molava, a citizen of England, so that all paperwork, including CTRs, would be in Molava's name; petitioner's obtaining of currency in a manner that enabled the conspirators to avoid transactions with legitimate financial institutions; petitioner's writing of checks to charitable entities

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[4] Count 1 also charged petitioner with conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i).

and others, utilizing the victim's funds; and petitioner's causing currency transactions to be conducted at his law offices to provide the other conspirators with untraceable currency. Indictment, Count 1. Regardless whether the conduct contemplated by petitioner and his co-conspirators otherwise constituted crimes, the agreement to engage in the above activities established a violation of Section 371 so long as the conspirators' intention was to defraud the IRS. No other mental state was required.

b. Contrary to petitioner's assertion (Pet. 11), it is not clear that any other court of appeals would have decided this case differently. The Eleventh Circuit's affirmance of petitioner's conspiracy conviction accords with the decision of the Seventh Circuit in *Jackson* and with the views of the Second Circuit, as recently clarified in *United States* v. *Wapnick*, 60 F.3d 948, 953 (1995) (embracing the reasoning in *Jackson*), petition for cert. pending, No. 95-1103. And, contrary to petitioner's assertion (Pet. 11), it is as yet unclear what position the Fourth Circuit would take on the issue presented here. In *United States* v. *Winfield*, 997 F.2d 1076, 1080-1081 (4th Cir. 1993), the defendants were indicted for conspiracy to commit the substantive offense of structuring transactions to avoid the CTR requirements, but the relevant count of the indictment was captioned "Conspiracy to Defraud." The judge instructed the jury that the defendants were charged with conspiracy "to defraud the United States in violation of 18 U.S.C. § 371 by conspiring to obstruct the CTR filing requirement of 31 U.S.C. §§ 5322 and 5324," and the court of appeals ostensibly set out to review the sufficiency of the evidence in support of that theory. *Id.* at 1081. The court correctly stated that conspiracy-to-defraud

requires only proof of an "intent to defraud the United States" (*id.* at 1082); the court also stated that "to be convicted of conspiracy to structure transactions to avoid CTR requirements, a party must have knowledge of the reporting requirements and act[] to avoid them," *ibid.* (internal quotation marks omitted), indicating that the court may have viewed the charge as embracing both a conspiracy to defraud the United States and a conspiracy to violate the CTR reporting requirements. The court analyzed the challenge brought by the first of the two defendants by reviewing the sufficiency of the "prosecution's evidence of a *conspiracy to obstruct the CTR requirements*." *Ibid.* (emphasis added). When the court reviewed the sufficiency of the evidence with respect to the second defendant, it looked to "[t]he evidence connecting [the second defendant] to a *conspiracy to defraud the government by obstructing the filing of CTR's*," *id.* at 1083 (emphasis added), but then twice described the charge against that defendant as "*conspiracy to violate the CTR requirements*," *ibid.* (emphasis added). *Winfield* has never been cited by the Fourth Circuit for any proposition. In light of the confusion evident in the opinion regarding the nature of the charges analyzed by the court of appeals, it is too early to tell whether the position of the Fourth Circuit conflicts with that taken by the Second, Seventh, and Eleventh Circuits.

The Third Circuit recently reversed a conspiracy conviction in light of *Ratzlaf*, but in circumstances that differ from those in this case. See *United States* v. *Alston*, No. 94-2195, 1996 WL 79826 (Feb. 26, 1996). Alston had been charged in one count with conspiracy to defraud the United States and the Department of the Treasury, and conspiracy to structure

transactions with the purpose of evading the CTR reporting requirements, in violation of 18 U.S.C. 371. In a separate count, he was charged with the substantive offense of structuring, in violation of 31 U.S.C. 5324 and 5322. Slip op. 2. Insofar as the conspiracy to defraud was concerned, the indictment "allege[d] no more than a conspiracy to defraud the United States by structuring," *ibid.*, and "the government offered the same body of evidence * * * to support both the charge against Alston for 'conspiracy to defraud' and the charge against him for 'conspiracy to structure,'" *id.* at 13. In those circumstances, the Third Circuit held that, "to obtain a conviction under either the 'defraud' or 'offense' clause of § 371, the government had to prove that Alston knew that his structuring activities were illegal." *Id.* at 14.

The Third Circuit was careful, however, "not [to] foreclose the possibility of convicting a defendant under § 371's 'defraud' clause based on charges *in addition to* or *different from* * * * acts of structuring." *Alston*, slip op. 14. It distinguished "cases that have upheld convictions for conspiracy to defraud under § 371 [and that] have all involved additional charges in the indictment and additional evidence produced at trial, over and beyond that required for a conviction for * * * structuring." *Ibid.* In particular, the *Alston* court distinguished *Jackson*, *inter alia*, on the ground that *Jackson* "involved extensive 'other evidence' beyond structuring activity demonstrating a conspiracy to defraud the United States." *Id.* at 15. This case is distinguishable from *Alston* on the same grounds. The indictment against petitioner alleged, and the evidence showed, that petitioner and his co-conspirators sought to defraud the United

States in many ways in addition to petitioner's failure to file CTRs. See pages 10-11, *supra*. It is therefore unlikely that the result in this case would have been any different had it arisen in the Third Circuit.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Petitioner's claim that the decision in this case conflicts with the Eleventh Circuit's earlier decisions in *United States* v. *Hernando Ospina*, 798 F.2d 1570 (1986), and *United States* v. *Eisenstein*, 731 F.2d 1540 (1984), merits no further review. This Court does not grant certiorari to resolve intra-circuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, the court in *Hernando Ospina* did not rule on the mental state necessary to sustain a conviction for conspiracy to defraud; and, while the court in *Eisenstein* did reverse both substantive currency reporting requirement convictions *and* associated conspiracy to defraud convictions because of the district court's erroneous exclusion of evidence relevant to the defendants' knowledge of the currency reporting requirements, the *Eisenstein* court did not specifically focus on whether proof of willfulness was required to sustain the conspiracy to defraud convictions.